



4/6
Appeal Brief
vs. Zimmerman
PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

Date: 27 June 2003

RUBIN, RICHARD

Art Unit: 3727

Serial No.: 09/664,885

Filed: 19 September 2000

Examiner: Garbe, Stephen P.

For: INSULATED FOOD CONTAINER

BRIEF FOR APPELLANT

RECEIVED

JUL 09 2003

TECHNOLOGY CENTER R3700

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

SIR:

Please consider the contents of the following Brief for Appellant.

I. **REAL PARTY IN INTEREST**

All of the right, title and interest in and to the above-described Patent Application are owned by appellant.

57/07/2003 CHUYEN 00000112 09664885

01 FC:2402

160.00 OP

II. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences related to the above described Patent Application.

III. STATUS OF THE CLAIMS

1. A copy of claims 1-20, all of the claims in the application, is provided in Appendix A.
2. Claims 1 and 8 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. Claims 2-7 and 9-13 stand rejected under 35 U.S.C. § 112, second paragraph, for the same reasons.
3. Claims 1-4, 8-10 and 14-17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Attaway (U.S.P. 5,775,530) in view of either Stewart (U.S.P. 5,692,660) or Goryl (U.S.P. 5,967,390).

4. Claims 5-7, 11-13, and 18-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Attaway (U.S.P. 5,775,530) in view of either Stewart (U.S.P. 5,692,660) or Goryl (U.S.P. 5,967,390) and further in view of Anderson et al. (U.S.P. 4,919,300).
5. Claims 5-7, 11-13, and 18-20 stand rejected under 35 U.S.C. § 103 (a) as being unpatentable over Attaway (U.S.P. 5,775,530) in view of Anderson et al. (U.S.P. 4,919,300).

IV. STATUS OF AMENDMENTS FILED SUBSEQUENT TO FINAL REJECTION

Appellant responded to the Final Rejection mailed 28 January 2003 in a response mailed 26 March 2003. No amendments were included in the response. An Advisory Action mailed 2 April 2003 affirmed the rejection without remarks.

V. EXPLANATION OF THE INVENTION

The application on appeal discloses and claims apparatus for keeping food warm and moist, one embodiment of which is illustrated in FIGS. 1 and 6, with the design and function described and explained on pages 6-12 of the present specification.

In the embodiment of FIGS. 1 and 6, the apparatus 10 includes a pouch 11, constructed to define an insulated and substantially water impermeable food warming chamber 14, with a film 13 of plastic material to provide water impermeability. Pouch 11 has opposing substantially coextensive lips 30, 31 defining a food passage 35 into food warming chamber 14. Lips 30, 31 are formed to provide a passive, non-sealing engagement causing a partial enclosure of food warming chamber 14. The partial enclosure is constructed to inhibit a build-up of moisture vapor produced from warm food (e.g. tortillas 15) disposed in food warming chamber 14, thereby preventing warm food disposed in food warming chamber 14 from becoming soggy while allowing enough moisture vapor to remain in food warming chamber 14 to keep warm food disposed in the warming chamber moist.

VI. ISSUES FOR REVIEW

The first issue is whether claims 1 and 8, and dependent claims 2-7 and 9-13, are definite?

The second issue is whether claims 1-4, 8-10 and 14-17 are patentable over Attaway (U.S.P. 5,775,530) in view of either Stewart (U.S.P. 5,692,660) or Goryl (U.S.P. 5,967,390)?

The third issue is whether claims 5-7, 11-13, and 18-20 are patentable over Attaway (U.S.P. 5,775,530) in view of either Stewart (U.S.P. 5,692,660) or Goryl (U.S.P. 5,967,390) and further in view of Anderson et al. (U.S.P. 4,919,300)?

The fourth issue is whether claims 5-7, 11-13, and 18-20 are patentable over Attaway (U.S.P. 5,775,530) in view of Anderson et al. (U.S.P. 4,919,300)?

VII. GROUPING OF CLAIMS

Appellant believes that all of the claims stand or fall together.

VIII. ARGUMENTIssue #1

Claims 1 and 8 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. Claims 2-7 and 9-13 are rejected under 35 U.S.C. § 112, second paragraph, for the same reasons. The Examiner alleges that the phrases "constructed to define", "formed to provide", "formed to produce", "constructed to provide", and "constructed to inhibit" render these claims indefinite because it cannot be determined what structural feature or features, if any, these phrases require. Appellant respectfully disagrees.

It is well established Patent Law that the pending claims must be given the broadest reasonable interpretation consistent with the specification. Also, the words of the claim must be given their plain meaning unless applicant has provided a clear definition in the specification. *In re Zletz*, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989). This of course means that the Examiner, as well as the appellant, must give the words of the claim their plain meaning. Further, the term "plain meaning" means that the words must be read as they

would be interpreted by those of ordinary skill in the art. *In re Sneed*, 218 USPQ 385 (Fed. Cir. 1983).

Applying the above rules to the limitations rejected by the Examiner as indefinite or functional, one must first ask: How would one of ordinary skill in the art interpret this language? The answer must be that any person skilled in the art would immediately recognize the fact that the phrases "constructed to define", "formed to provide", "formed to produce", "constructed to provide", and "constructed to inhibit" include either the verb "constructed" or "formed" modified by an obviously incomplete prepositional phrase (i.e. "to define", "to provide", "to produce", "to provide", and "to inhibit"). Since "define", "provide", "produce", and "inhibit" are verbs, proper English dictates that they be modified by a noun or a phrase acting as the object of the verb. Thus, that skilled artisan would look further to complete the thought and find the object.

In his search the skilled artisan would discover from the claim that the phrase "constructed to define" is modified by the noun phrase: "an insulated and substantially water impermeable food warming chamber". Note that the noun phrase is specific structure. Thus, the verb "define" in the prepositional phrase is modified by the noun phrase to make it

complete and the verb "constructed" is modified by the complete prepositional phrase to make it complete. Clearly, the claimed structure would always be interpreted by a skilled artisan to include the specific object of the verb and not simply end in an unfinished statement that the units are "constructed to define".

Applying the above rules to the word "pouch", it can be determined from the *Webster's New Universal Unabridged Dictionary* that the first or primary meaning is "a bag, sack, or similar receptacle, esp. one for small articles or quantities." Since appellant has not provided a clear definition in the specification, the words of the claim must be given their plain meaning. *In re Zletz*. Thus, since a pouch is already defined as a bag, sack, or receptacle, any of which clearly define a chamber, the questioned phrase is definite in that it specifies a pouch constructed to define a chamber. The variation is that the pouch includes "a layer formed of a film of plastic material", which obviously makes the chamber "an insulated and substantially water impermeable food warming chamber". This language does not make the claim indefinite since one skilled in the art would immediately understand how it was constructed.

Thus, the structural feature clearly set forth in the first allegedly indefinite phrase is: "the pouch being constructed to define an insulated and substantially water impermeable food warming chamber". The pouch includes a layer formed of a film of plastic material. Appellant does not believe that constructing a pouch with a film of plastic material to define an insulated and substantially water impermeable food chamber is indefinite because it cannot be determined what structural feature this phrase requires. This is especially true since the Examiner has already accepted as definite the phrase previously in claim 1: "the pouch bounds an insulated and substantially water impermeable food warming chamber".

Further, in the second allegedly indefinite phrase the skilled artisan would discover from the claim that the phrase "formed to provide" is modified by the noun phrase: "a passive, non-sealing engagement between the lips". This again sets forth specific structure and is definite, especially since the Examiner has already accepted as definite the phrase "a passive, non-sealing engagement between the lips", which was previously in the claim.

In the third allegedly indefinite phrase (apparently in claim 8), the skilled artisan would discover from the claim

that the phrase "formed to produce" is modified by the noun phrase: "a passive, non-sealing engagement between the lips". This phrase is similar to the above discussed phrase "formed to provide" and all of the above arguments apply.

In the fourth allegedly indefinite phrase (apparently in claim 8), the skilled artisan would discover from the claim that the phrase "constructed to provide" is modified by the noun phrase "a partial vapor lock in the food warming chamber", which is specific structure.

In the fifth allegedly indefinite phrase the skilled artisan would discover from the claim that the phrase "constructed to inhibit" is modified by the noun phrase "a build-up of moisture vapor produced from warm food disposed in the warming chamber". Thus, the skilled artisan would understand that the partial enclosure is constructed to inhibit a build-up of moisture vapor in the warming chamber. This is definite language describing specific structure. Previously, the Examiner accepted as definite the language "the partial enclosure . . . inhibiting moisture vapor from warm food disposed in the warming chamber from building-up in the warming chamber".

As explained above, the objects of all of the phrases selected by the Examiner as indefinite were included in the claims, as amended the first time. At that time the Examiner alleged that these various phrases were functional language and did not distinguish appellant's structure from the cited art. Accordingly, appellant amended his claims to make the alleged functional statements part of the structure. It is improper to continue to ignore the alleged functional statements and to reject the claims as indefinite on the basis of a partial and clearly grammatically incorrect phrase.

Appellant strongly asserts that these limitations must be considered by the Examiner and cannot simply be ignored. Even if, *arguendo*, the phrases were functional, "It is well settled that there is nothing intrinsically wrong in defining something by what it does rather than by what it is." *In re Echerd* 471 F.2d 632, 176 USPQ 321 (CCPA 1973); *In re Swinehart*, 58 CCPA 1027, 439 F.2d 210, 169 USPQ 226 (1971); *In re Fuetterer*, 50 CCPA 1453, 319 F.2d 259, 138 USPQ 217 (1963). "Product claims may be drafted to include process steps to wholly or partially define claimed product, to extent that process limitations distinguish products over prior art, they must be given same consideration as traditional product characteristics." *In re Luck*, 476 F.2d 650, 177 USPQ 523 (CCPA 1973). In *Ex parte Stanley*, 121 USPQ 621, the Patent

Office Board of Appeals stated "We will not sustain this latter ground of rejection. The examiner apparently accepts as being proper a "means" coupled with a function. Under the particular circumstances of the present case the term "device" with respect to its significance and coverage is synonymous with the term "means", in these claims to the apparatus. Accordingly, the term "device" coupled with a function is a proper definition of structure and is therefore within the requirements of 35 U.S.C. 112, last paragraph."

While the above quoted law is relatively old, appellant has seen no indication that it has been overturned. In fact, the final paragraph of 35 U.S.C. 112 still allows means plus function claims, that is, structure defined by function. This is especially true in situations where the structure is hard to define. For example, constructing a pouch with a layer of plastic material to define an insulated and substantially water impermeable food warming chamber is not functional or indefinite simply because it differentiates the structure from a case for protecting fragile objects (e.g. Attaway). In this instance "an insulated and substantially water impermeable food warming chamber" is specific structure not a statement as to what the structure does. In fact, what the structure does is warms food, which is substantially different than the fact that the structure is a food warming chamber. The difference

clearly differentiates the present structure from the precepts of *Hewlett-Packard Co. v. Bausch & Lomb Inc.* 909 F.2d 1464, 1469, 15 USPQ2d 528, 531 (CCPA 19599).

Thus, the five allegedly indefinite statements are not indefinite and, when considered in accordance with well established Patent Law and the English language, describe specific structure. Further, the language describing the structure is not functional since it describes the structure and not what the structure does (e.g. a food warming chamber versus a chamber for warming food). Finally, even if, arguendo, the language is functional the Examiner must consider it in accordance with the well established precepts of Patent Law cited above. Therefore, appellant believes that the indefinite argument has been overcome and the rejection under 35 U. S. C. 112, second paragraph, should be dropped.

Issue #2

Claims 1-4, 8-10, and 14-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Attaway (USP 5,775,530) in view of either Stewart (USP 5,692,660) or Goryl (USP 5,967,390). Appellant respectfully traverses this rejection.

Claim 1 clearly specifies "the pouch being constructed to define an insulated and substantially water impermeable food warming chamber". Similarly, claim 8 states "a substantially water impermeable plastic film pouch defining a food warming chamber". Thus, a food warming chamber is a specific element of these claims. Attaway does not disclose or even suggest a food warming chamber and, therefore, cannot be modified by other citations that do not suggest food warming chambers to provide a modified food warming chamber.

The Examiner argues that "Attaway does not need a disclosure that it can be used for food because the claims do not require any structural feature specifically adapting it for food". Appellant believes, respectfully, that this contention is erroneous. Taking either claim 1 or 8 as an example, the entire claim is drawn to "Apparatus for keeping food warm and moist". Appellant again stresses that all of the words of the claim must be considered, "All words in a claim must be considered in judging patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 165 USPQ 494. 496 (CCPA 1970). If the entire claim is considered, it clearly defines structure not included in Attaway.

For example, claim 1 states "a pouch including a layer formed of a film of plastic material to provide water impermeability" and claim 8 states "a substantially water impermeable plastic film pouch defining a food warming chamber". First it must be noted that the film of plastic provides water impermeability. Attaway does disclose nylon material on the inner and outer surfaces of his neoprene walls. However, nothing in his disclosure even remotely suggests that the nylon material makes the enclosure water impermeable. Nylon material comes in many forms (e.g. nylon stockings) many of which are not impermeable. In fact, nylon cloth generally must be treated to make it waterproof or impermeable to water. Since Attaway does not disclose or suggest "a substantially water impermeable plastic film pouch" he does not disclose the same structure as claims 1 and 8. Assuming that Attaway's nylon material is waterproof or water impermeable is an improper taking of judicial notice specifically traversed by appellant.

The Examiner argues that each of Stewart and Goryl disclose containers having a layer of waterproof nylon plastic material. To justify this conclusion he states:

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make Attaway's nylon layers waterproof, as taught by either Stewart or Goryl, because waterproof material

would have prevented the contents of Attaway's container from getting wet and rusting.

The Examiner may be correct in assuming that it would be obvious to waterproof the protection case of Attaway in view of the article carrying bag of Stewart. However, his argument proves why, specifically, they are non-analogous art. Appellant's claims specifically set forth a food warming chamber that is designed and constructed to keep food warm and moist. People skilled in the food industry know it is generally desirable to keep most foods moist, while people in the packing industry know it is desirable to keep all moisture out. Thus, the Examiner's rationale for combining the citations might make sense to those skilled in the packing or carrying arts but are directly contrary to the thinking of those skilled in the food art.

Claim 1 now specifically states "the partial enclosure caused by the passive, non-sealing engagement between the lips and the food warming chamber being constructed to inhibit a build-up of moisture vapor produced from warm food disposed in the warming chamber for preventing warm food disposed in the warming chamber from becoming soggy and to allow enough moisture vapor to remain in the warming chamber for keeping warm food disposed in the warming chamber moist". Claim 8 specifies "the partial enclosure caused by the passive, non-

sealing engagement between the lips and the food warming chamber being constructed to provide a partial vapor lock in the food warming chamber". Appellant does not believe that Attaway can provide this structure, since his case is specifically designed with "inside dimensions smaller than said fragile object" (Attaway, claim 1), which would hold the upper and lower portions rigidly in place. No one (except possibly Attaway) could possibly tell from the Attaway disclosure what would happen if warm food were placed in his case. Certainly, nothing suggests that a partial vapor lock (specific structure) would be created at the opening between his top and bottom portions. Thus, since Attaway does not disclose or suggest "a partial vapor lock" claims 1 and 8 are not obvious in view of Attaway.

Claim 1 clearly specifies "the pouch being constructed to define an insulated and substantially water impermeable food warming chamber". Similarly, claim 8 now states "a substantially water impermeable plastic film pouch defining a food warming chamber". Thus, a food warming chamber is a specific element of these claims and the Examiner's rationale as to rusting and keeping the interior dry is a classic example of why that is important. One skilled in the art of the food industry will look at art much differently than one skilled in the art of packing or carrying items. Neither

Attaway, Stewart, nor Goryl disclose or even suggest a food warming chamber.

Appellant must restate his argument that all three patents, e.g. Attaway, Stewart, and Goryl, are non-analogous art. The Examiner must determine what is "analogous prior art" for the purpose of analyzing the obviousness of the subject matter at issue. "In order to rely on a reference as a basis for the rejection of an applicant's invention the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problems with which the inventor was concerned." *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). The Examiner himself admits that those skilled in the art pertaining to any of Attaway, Stewart, and Goryl will worry about rust and keeping stored devices dry.

The Examiner then disregards major portions of appellant's argument "because they rely on function only and do not point out any structural feature not shown by Attaway." Appellant strongly objects to this action because the language that the Examiner alleges is functional describes specific structure that is important to the invention.

Appellant believes that the determination as to whether language in a claim is functional or structural is not a decision that can be made without some supporting basis or rational. That is, functional language cannot be a unilateral decision but must have some basis in fact or law. For example, in the case of *In re Casey*, 152 USPQ 235 (CCPA 1967) the Court dealt with a case in which a taping machine was claimed and the claims included references to adhesive tape handling. The Court upheld the rejection stating that "the references in claim 1 to tape handling do not expressly or impliedly require any particular structure in addition to that of Kienzle." The perforating device had the structure of the taping device as claimed, the difference was in the use of the device, and "the manner or method in which such machine is to be utilized is not germane to the issue of patentability of the machine itself."

Applying this case law to appellant's claims: First, it is clear from Attaway's disclosure and drawings, as well as the Examiner's interpretation of the operation, that Attaway's structure does not, and cannot, operate like appellant's structure. Second, the alleged functional language in appellant's claims does not describe a different use for appellant's structure nor does it describe "the manner and method" in which the structure is to be utilized. The

Examiner maintains that the controversial limitations are "statements of function and intended use". The determination that the language is functional with no basis in law or fact is error. The controversial limitations describe a specific structure and a result that will occur only if that specific structure is provided. This determination is proven by the fact that Attaway's structure cannot operate in the same fashion as the claimed structure.

"All words in a claim must be considered in judging patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 165 USPQ 494. 496 (CCPA 1970).

Taking the claimed invention as a whole (claim 1, for example), apparatus for keeping food warm and moist is specified. The apparatus comprises: (1) a pouch including a layer formed of a film of plastic material to provide water impermeability; (2) the pouch being constructed to define an insulated and substantially water impermeable food warming chamber; (3) the pouch having opposing substantially coextensive lips formed to provide a passive, non-sealing engagement between the lips causing a partial enclosure of the warming chamber; and (4) the partial enclosure and the food warming chamber being constructed to inhibit a build-up of moisture vapor produced from warm food disposed in the warming

chamber and to allow enough moisture vapor to remain in the warming chamber for keeping warm food disposed in the warming chamber moist.

Note that all four of the items specified are, or include, structure that specifically defines the invention. Taking these items one at a time:

Element (1) includes the structure: "a pouch including a layer formed of a film of plastic material". Clearly, this language has nothing to do with "the manner or method in which such machine is to be utilized", it simply states structure.

Element (2) includes the structure: "the pouch being constructed to define an insulated and substantially water impermeable food warming chamber". Clearly, this language has nothing to do with "the manner or method in which such machine is to be utilized", it simply states structure.

Element (3) includes the structure: "the pouch having opposing substantially coextensive lips defining a food passage into the food warming chamber; the lips being formed to provide a passive, non-sealing engagement between the lips causing a partial enclosure of the warming chamber". Clearly, this language has nothing to do with "the manner or method in which such machine is to be utilized", it simply states structure.

Element (4) includes the structure: "the partial

enclosure . . . "being constructed to inhibit a build-up of moisture vapor" which describes structure only. Also, the language "to allow enough moisture vapor to remain in the warming chamber for keeping warm food disposed in the warming chamber moist" describes the operation of the partial enclosure or the lips and, therefore, describes the structure in terms of the operation of the lips. The language does not describe the structure in terms of the manner or method in which such machine is to be utilized. Thus, this language comes within the precepts of *In re Echerd*, *In re Swinehart*, *In re Fuetterer* and not *Hewlett-Packard Co v. Bausch & Lomb Inc.* or *In re Casey*.

Nothing in the teachings of Attaway, Stewart, or Goryl suggest a warming chamber with lips that allow some moisture to escape but retain some moisture from warm food. In fact the protection device of Attaway is formed to grip the protected object and would not react to any warm food placed in it. That is, once pulled into a protective orientation, there is no teaching or suggestion that the upper and lower portions might separate enough to allow moisture to escape from within. The upper and lower portions might stay sealed together sufficiently to prevent moisture from entering, as suggested by the Examiner, which would clearly differentiate them from appellant's claimed structure since if moisture

cannot enter it cannot exit. The bags of Stewart are designed to be permanently closed by draw strings. The inflatable box of Goryl might not even have a cover in some embodiments. Thus, no combination of these references would produce the claimed structure since none of the references are constructed to operate in a similar fashion.

Issue #3

Claims 5-7, 11-13, and 18-20 are rejected under 35 U.S.C. § 103 as being unpatentable over Attaway (U.S.P. 5,775,530) in view of either Stewart (U.S.P. 5,692,660) or Goryl (U.S.P. 5,967,390) and further in view of Anderson et al. (U.S.P. 4,919,300). Appellant respectfully traverses this rejection.

Claims 5-7 are dependent upon claim 1, claims 11-13 are dependent upon claim 8, and claims 18-20 are dependent upon claim 14. For all of the reasons given above, these dependent claims are allowable over Attaway, Stewart, and Goryl individually or in any proper combination.

In addition to Attaway, Stewart, and Goryl, the Examiner has included Anderson et al. As explained in detail above, Anderson et al. is non-analogous art that pertains to shipping

containers. Clearly this disclosure is far from appellant's field of endeavor. Further, there is no reason why this disclosure would have logically commended itself to anyone's attention when considering problems in the food warming art. Therefore, this citation is clearly non-analogous art and should not be considered in determining obviousness.

To establish the *prima facie* case of obviousness, which the Examiner must establish, the first basic criteria that must be met is to show some suggestion or motivation to modify the references or to combine reference teachings to arrive at appellant's claimed method. No suggestion or motivation to cure the problem solved by appellant's invention is included anywhere in any of Attaway, Stewart, Goryl, or Anderson et al. Further, the references when combined must teach or suggest all of the claim limitations. Again, there is no suggestion or motivation to combine the teachings of Attaway, Stewart, Goryl, or Anderson et al. to result in the claimed invention.

Therefore, appellant believes that claims 5-7, 11-13, and 18-20 are not obvious in view of any proper combination of Attaway, Stewart, Goryl, or Anderson et al. and are, therefore, allowable.

Issue #4

Claims 5-7, 11-13, and 18-20 are rejected under 35 U.S.C. § 103 as being unpatentable over Attaway (U.S.P. 5,775,530) in view of Anderson et al. (U.S.P. 4,919,300). Appellant respectfully traverses this rejection.

Claims 5-7 are dependent upon claim 1, claims 11-13 are dependent upon claim 8, and claims 18-20 are dependent upon claim 14. For all of the reasons given above, these dependent claims are allowable over Attaway and/or Anderson et al. individually or in any proper combination.

As explained in detail above, Anderson et al. is non-analogous art that pertains to shipping containers. Clearly this disclosure is far from appellant's field of endeavor. Further, there is no reason why this disclosure would have logically commended itself to anyone's attention when considering problems in the food warming art. Therefore, this citation is clearly non-analogous art and should not be considered in determining obviousness.

SUMMARY

All of the appealed claims specify apparatus for keeping food warm and moist which comprises a water impermeable pouch with non-sealing lips inhibiting moisture vapor produced from warm food disposed in the warming chamber from building up in the warming chamber so that warm food disposed in the warming chamber is prevented from becoming soggy while allowing enough moisture vapor to remain in the warming chamber to keep warm food disposed in the warming chamber moist.

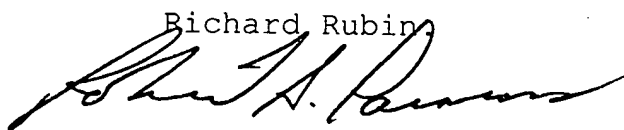
None of the cited references deal with food and are all nonanalogous art. Also, the cited references individually or in any proper combination cannot meet the limitations of the claims taken as a whole. The Examiner admits, for example, that it would have been obvious to make Attaway's container waterproof "because waterproof material would have prevented the contents of Attaway's container from getting wet and rusting" (i.e. no moisture inside the container). This clearly differentiates the combination of Attaway and Stewart or Goryl from appellant's claimed structure which allows moisture to exit the food warming chamber. Further, since none of the cited references deal with food, none of the cited references individually or in any proper combination would suggest to one skilled in the art appellant's novel food

warmer. Since, none of the cited references individually or in any proper combination can achieve the structural limitations of the claimed invention, appellant believes that claims 1-20 are now in condition for allowance.

Accordingly, it is respectfully asserted that appellant's claims 1-20 are clearly allowable and the case is now in condition for allowance. Appellant therefore prays for the reversal of the final rejection and the allowance of the subject application.

Respectfully submitted,

Richard Rubin



Robert A. Parsons

Attorney for Appellants

Registration No. 32,713

01 July 2003

340 East Palm Lane, Suite 260

Phoenix, Arizona 85004

(602) 252-7494

APPENDIX A

1. Apparatus for keeping food warm and moist comprising:

a pouch including a layer formed of a film of plastic material to provide water impermeability, the pouch being constructed to define an insulated and substantially water impermeable food warming chamber;

the pouch having opposing substantially coextensive lips defining a food passage into the food warming chamber;

the lips being formed to provide a passive, non-sealing engagement between the lips;

the passive, non-sealing engagement between the lips causing a partial enclosure of the warming chamber; and

the partial enclosure caused by the passive, non-sealing engagement between the lips and the food warming chamber being constructed to inhibit a build-up of moisture vapor produced from warm food disposed in the warming chamber for preventing warm food disposed in the

warming chamber from becoming soggy and to allow enough moisture vapor to remain in the warming chamber for keeping warm food disposed in the warming chamber moist.

2. Apparatus of claim 1, wherein the warming chamber is insulated with insulating structure.

3. Apparatus of claim 2, wherein the insulating structure comprises a pouch formed of engaged superimposed layers of cloth and insulating material.

4. Apparatus of claim 2, wherein the insulating structure comprises opposing and partially joined insulators each comprising engaged superimposed layers of cloth and insulating material.

5. Apparatus of claim 1, further including a closure for actively and partially coupling together the lips.

6. Apparatus of claim 5, wherein the closure comprises an engagement element supported by one of the lips and an opposing and detachably engagable complementary engagement element supported by the other of the lips.

7. Apparatus of claim 6, wherein the engagement element comprises one of a hook medium and a loop medium and the complementary engagement element comprises the other of the hook medium and the loop medium.

8. Apparatus for keeping food warm and moist comprising:

insulating structure supporting and substantially engulfing a substantially water impermeable plastic film pouch defining a food warming chamber for accommodating food;

the pouch and the insulating structure together providing generally opposing and substantially coextensive lips defining a food passage into the food warming chamber;

the lips being formed to produce a passive, non-sealing engagement between the lips;

the passive, non-sealing engagement between the lips causing a partial enclosure of the warming chamber; and

the partial enclosure caused by the passive, non-sealing engagement between the lips and the food warming chamber being constructed to provide a partial vapor lock in the food warming chamber inhibiting moisture vapor produced from warm food disposed in the warming chamber from building up in the warming chamber, which prevents warm food disposed in the warming chamber from becoming soggy and allows enough moisture vapor to remain in the warming chamber for keeping warm food disposed in the warming chamber moist.

9. Apparatus of claim 8, wherein the insulating structure comprises a pouch formed of engaged superimposed layers of cloth and insulating material.

10. Apparatus of claim 8, wherein the insulating structure comprises opposing and partially joined insulators

each comprising engaged superimposed layers of cloth and insulating material.

11. Apparatus of claim 8, further including a closure for actively and partially coupling together the lips.

12. Apparatus of claim 11, wherein the closure comprises an engagement element supported by one of the lips and an opposing and detachably engagable complementary engagement element supported by the other of the lips.

13. Apparatus of claim 12, wherein the engagement element comprises one of a hook medium and a loop medium and the complementary engagement element comprises the other of the hook medium and the loop medium.

14. Apparatus for storing and keeping food warm and moist comprising:

a soft and flexible insulated pouch having a substantially water impermeable warming chamber and lips;

a non-sealing engagement between the lips causing a partial enclosure of the warming chamber;

the partial enclosure caused by the non-sealing engagement between the lips inhibiting moisture vapor produced from warm food disposed in the warming chamber from building up in the warming chamber, which prevents warm food disposed in the warming chamber from becoming soggy and allows enough moisture vapor to remain in the warming chamber for keeping warm food disposed in the warming chamber moist.

15. Apparatus of claim 14, wherein the warming chamber is insulated with insulating structure.

16. Apparatus of claim 15, wherein the insulating structure comprises a pouch formed of engaged superimposed layers of cloth and insulating material.

17. Apparatus of claim 15, wherein the insulating structure comprises opposing and partially joined insulators

each comprising engaged superimposed layers of cloth and insulating material.

18. Apparatus of claim 14, further including a closure for actively and partially coupling the passive opening.

19. Apparatus of claim 14, wherein the closure comprises an engagement element and a detachably engagable complementary engagement element.

20. Apparatus of claim 19, wherein the engagement element comprises one of a hook medium and a loop medium and the complementary engagement element comprises the other of the hook medium and the loop medium.



~~AF~~
3727

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Richard Rubin)
Serial No.: 09/664,885) Ex: GARBE
Filed: 19 September 2000) Art Unit: 3727
For: INSULATED FOOD CONTAINER)

TRANSMITTAL OF APPEAL BRIEF

RECEIVED

JUL 09 2003

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

TECHNOLOGY CENTER R3700

Dear Sir:

Enclosed is the Brief on Appeal and two copies of the same, in compliance with the Rules, in the above captioned matter, and a check in the amount of \$160.00, the requisite fee set forth in 37 CFR 1.17(f).

Respectfully submitted,

Robert A. Parsons
Attorney for Applicant
Registration No. 32,713

01 July 2003

340 East Palm Lane
Suite 260
Phoenix, Arizona 85004

(602) 252-7494



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Richard Rubin)
Serial No.: 09/664,885) Ex: GARBE
Filed: 19 September 2000) Art Unit: 3727
For: INSULATED FOOD CONTAINER)

CERTIFICATE OF MAILING

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

RECEIVED

JUL 09 2003

TECHNOLOGY CENTER R3700

Dear Sir:

I hereby certify that the attached Transmittal Letter; Appeal Brief and two (2) copies; Check for appropriate fee; and a postcard are being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner of Patents and Trademarks, Washington, D.C. 20231, on 01 July 2003.

Webb Edmuth
Signature

01 July 2003

01 July 2003
Date

Respectfully submitted,

Robert A. Parsons
Attorney for Applicant
Reg. No. 32,713

Parsons & Goltry
340 East Palm Lane
Suite 260
Phoenix, Arizona 85004
(602) 252-7494